

In the Matter of)
)
Partitioning, Disaggregation, and) WT Docket No. 19-38
Licensing of Spectrum)

To: The Commission

The Wireless Internet Service Providers Association (“WISPA”) hereby submits its Reply Comments in support of certain rule changes proposed in the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.¹ Commenters by and large agree that modifying the rules relating to partitioning, disaggregation, and leasing would facilitate secondary market transactions and help spur more efficient and pro-competitive use of otherwise fallow spectrum.²

Based on the record established by the initial comments, the Commission should expand the scope of eligibility described in the *NPRM* beyond the confines of Title II “common carriers” to include any unaffiliated small or rural service provider in order to maximize the intended public interest benefits of secondary market transactions. The Commission also should afford flexibility to both parties to such transactions to reasonably reduce their performance requirements and encourage deployment of service that will help close the digital divide.

² See e.g. NRECA Comments at 6; Select Spectrum Comments at 7 (arguing for immediate approval process for license transactions); Dynamic Spectrum Alliance Comments at 7-12 (arguing for a use-it or share-it framework and an automated database); CTIA Comments at 7 (contending that the Commission should implement its immediate approval process for spectrum lease filings); Google Comments at 2-7 (asking the Commission to continue stimulating secondary markets to improve their effectiveness).

However, permitting reaggregation of smaller licenses would defeat the purpose of the policy goals intended by the MOBILE NOW Act and could enable gaming of the market. Finally, the Commission should streamline secondary market approval procedures, but should not abdicate its statutory responsibility to review assignees' qualifications.

Discussion

I. THE COMMISSION SHOULD APPLY ITS REVISED RULES BROADLY TO BOTH CARRIERS AND OTHER SERVICE PROVIDERS

A number of commenters agree that the Commission should not limit the scope of the secondary market incentives intended by the MOBILE NOW Act to “common carriers” alone, and no commenter appears to oppose a more inclusive definition.³ As WISPA explained in its Comments, applying the rules more broadly as a means of fostering “the availability of advanced communications” in “rural areas” would be consistent with Congressional objectives.

Restricting the benefits and build-out incentives only to established “carriers” would artificially limit the market for spectrum licensees that wish to disaggregate, partition, or lease spectrum to smaller rural providers.⁴ Consistent with the record, the Commission should adopt the specific definitions of “unaffiliated covered small carrier” and “unaffiliated carrier to serve a rural area” WISPA has proposed.⁵

In support of a more expansive definition of the eligible entities, the National Rural Electric Cooperative Association (“NRECA”) points out that limiting the intended benefits to “common carriers” would adversely affect deployment of evolving “Smart Grid” technologies that require the use of internal, non-common carrier based services to function and serve the

³ See CCA Comments at 6; Midcontinent Communications Comments at 3-4; NRECA Comments at 5; American Petroleum Institute Comments at 1; Select Spectrum Comments at 2.

⁴ WISPA Comments at 4.

⁵ *Id.* at 6.

public.⁶ As NRECA puts it, “commercial carrier services often do not adequately cover the rural and remote areas served by electric coops.”⁷

Midcontinent Communications agrees that a narrow definition of “carrier” would unnecessarily limit the effectiveness and reach of the rules.⁸ It explains that the process of becoming a Title II “common carrier” imposes obligations that can make it more difficult to provide service rural areas that most need access to broadband. Further, a limited pool of small and rural carriers will mean fewer options for larger carriers that wish to disaggregate, partition, or lease their spectrum, and will do little to encourage deployment of new technologies and services to rural areas.

The Telecommunications Act of 1996 makes it the policy of the United States to encourage new technologies and services to the public.⁹ A number of commenters demonstrated that there is no public policy reason for the Commission to limit arbitrarily the pool of eligible providers to only “common carriers,” and that doing so would run counter to the stated policy of encouraging the provision of new technologies and services to the public.¹⁰

The record and Commission policy strongly support definitions of “unaffiliated covered small carrier” and “unaffiliated carrier to serve a rural area” that include entities that are not Title “common carriers.” The Commission should adopt the definitions of proposed by WISPA that will not “limit the pool of providers, decrease the vibrancy of the secondary market, and increase the possibility that rural areas will remain unserved.”¹¹

⁶ NRECA Comments at 7-8. *See also* American Petroleum Institute Comments at 1 (arguing that the Commission should include Critical Infrastructure entities in the definition of “covered small carrier”).

⁷ *Id.*

⁸ Midcontinent Communications Comments at 3-4.

⁹ *See* 47 U.S.C §157(a).

¹⁰ *See* WISPA Comments at 5-6.

¹¹ *Id.* at 6.

II. COMMENTERS AGREE THAT THE COMMISSION SHOULD PROVIDE INCENTIVES TO ENCOURAGE SECONDARY MARKET TRANSACTIONS

All commenters agree with WISPA that the Commission should adopt rules “encouraging licensees to lease or sell spectrum” to facilitate deployment to rural and underserved areas.¹² However, the Commission should exercise caution and not award outsized benefits to incumbent licensees.¹³

Some Commenters suggest that the Commission should allow opportunistic use of licensed spectrum to promote secondary market transactions.¹⁴ Open Technology Institute and Public Knowledge support a “use it or share it” framework to “ensure licensees cannot warehouse spectrum indefinitely or exclude potential rural ISPs able to make use of that spectrum. . . .” Dynamic Spectrum Alliance likewise favors a “use it or share it” framework to reduce spectrum warehousing, encourage secondary market transactions by facilitating price discovery, and lower barriers for to entry for “innovative new use case by parties.”¹⁵ Taking a different tack, NTCA suggests a “keep what you use” requirement for licenses issued ten or more years ago that “do not include construction benchmarks.”¹⁶

Based on its review of the record, WISPA maintains its belief that, instead of adopting *either* “use it or share it” or a “keep what you use” rules, the Commission should employ *both*

¹² See *NPRM* at 8 (¶25). See, e.g., NTCA Comments at 2-4 (urging a “use-it-or-lose-it” framework for certain licenses); CCA Comments at 2-3 (Commission should adopt modified performance requirements or license terms for licensees that buy or lease spectrum); DSA Comments at 7-10 (Commission should extend its “use-it-or-share-it” framework to promote the use of spectrum and encourage secondary markets); Open Technology Institute at 6-8 (Commission should use a “use-or-share” framework to allow for opportunistic spectrum access).

¹³ WISPA Comments at 7.

¹⁴ See also Google Comments at 18 (arguing that this approach “would stimulate spectrum supply and prevent waste” by making spectrum available quickly to other users instead of allowing it to remain fallow until lost).

¹⁵ See DSA Comments at 9-10.

¹⁶ NTCA Comments at 2-3.

mechanisms.¹⁷ Assuming that licensees will build out to urban “donut holes” first, allowing opportunistic use will either encourage the licensee to cover the outer “donut” areas to avoid the future loss of market coverage. It will also establish the opportunistic users as likely purchasers of the spectrum, a better outcome for the incumbent licensee than forfeiting the license under a more-restrictive “keep what you use” approach.

A number of commenters suggest at least some flexibility in the buildout and performance requirements applicable to small and rural providers engaging in secondary market transactions.¹⁸ By contrast, the Rural Wireless Association and others argue that the Commission should not extend buildout deadlines out of fear that it will result in spectrum warehousing.¹⁹ WISPA generally supports some flexibility in the buildout requirements, but cautions that the Commission should be wary of unintentionally incentivizing “license-flipping.”²⁰ More specifically, as WISPA stated in its initial comments, the Commission should give secondary market licensees the option of either two additional years to construct *or* use of non-population-based performance requirements to demonstrate substantial service.²¹ Similarly, CCA “generally supports strong buildout requirements, some flexibility to the requirements . . . will help account for the unique circumstances associated with receiving partitioned or disaggregated licenses.”²² CTIA also agrees that the Commission should provide a brief extension to a receiving party when the transaction “occurs late in a license term – *e.g.*, within one or two years of the construction deadline”²³ Although CTIA argues that the extension

¹⁷ See WISPA Comments at 7.

¹⁸ See, *e.g.*, CCA Comments at 3-6; CTIA Comments at 11; Google Comments at 17 (extended buildout timeframes could be an incentive to licensees that free spectrum in the “opportunity zone”).

¹⁹ See Rural Wireless Association Comments at 4; GeoLinks Comments at 3.

²⁰ See WISPA Comments at 8.

²¹ See *id.*

²² CCA Comments at 4.

²³ CTIA Comments at 11.

should be limited to requests filed no later than six months before the construction deadline to prevent eleventh-hour filings as a way to avoid loss of a license,²⁴ WISPA believes that CTIA's suggested approach would impose an unnecessarily restrictive general prohibition as an overbroad means of preventing what are likely to be relatively rare occurrences. If a large carrier is incentivized to lease spectrum before it reverts to the Commission, it is likely to pursue this approach earlier in its license term and realize some benefit from the spectrum.

This incentive should not be unlimited. A receiving licensee should not be afforded both extended buildout obligations *and* modified performance requirements but should have the option of one of these inducements to encourage secondary market transactions and rural broadband expansion. CTIA argues that to allow for reduced performance requirements for the leasing or receiving entity would be unfair because affording the original licensee such incentives might promote the same result.²⁵ CTIA further asserts that reducing the requirements does nothing to bridge the digital divide but instead benefits only the receiving licensee.²⁶ This argument fails to acknowledge that a small carrier likely has not planned or budgeted for license acquisition or buildout during the incumbent's license term. In these cases, adhering to the incumbent's buildout deadlines will act as a disincentive to small and rural carriers that need time to acquire the resources to construct and initiate operations. By making performance requirements more lenient, the Commission can promote greater interest among small and rural carriers to acquire disaggregated, partitioned or leased spectrum in unserved rural areas.²⁷

In addition, as WISPA stated in its Comments, the Commission should impose a minimum holding period for licenses obtained via partitioning or disaggregation at least until the

²⁴ *See id.*

²⁵ *See id.* at 12-13.

²⁶ *See id.*

²⁷ *See* R Street Institute Comments at 3.

receiving licensee has met the applicable buildout requirement for the license.²⁸ As WISPA previously argued, this will incentivize faster buildout and curb the potential for license-flipping from an initial purchaser to another service provider.²⁹ This approach will incentivize leasing to small and rural providers that are most eager to provide broadband in their communities .

Similarly, the Commission should not permit reaggregation of licenses, despite the contrary views of a few commenters that support such transactions.³⁰ The goals of secondary market transactions should be two-fold. First, to create new opportunities for smaller and rural service providers; and second, to allow large providers to benefit from isolating a portion of a license to allow smaller and rural service providers to use the spectrum in lieu of returning it to the Commission where it could lie fallow for some time.³¹ Reaggregation would defeat these critical goals³² and potentially lead to gamesmanship³³ or spectrum warehousing by larger providers.³⁴ Once established, smaller license areas that are “right-sized” to meet the needs of rural consumers should not be permitted to be simply reabsorbed by large carriers into wide-area licenses. Such “pass-throughs” would undermine the purposes intended by the MOBILE NOW Act, leading to reduced service to small and rural communities due to the amassing of spectrum rights by large operators ill-suited and unaccustomed to meeting the unique and varied needs of such populations.

²⁸ See WISPA Comments at 8.

²⁹ See *id.*

³⁰ See R Street Institute Comments at 4; CCA Comments at 3; CTIA Comments at 14-15; Google Comments at 14-17.

³¹ See WISPA Comments at 8.

³² See *id.*; see also GeoLinks Comments at 4 (arguing that reaggregation does not promote the goal of increasing spectrum access by small and rural carriers).

³³ See WISPA Comments at 9.

³⁴ See Rural Wireless Association Comments at 5 (contending that reaggregation will encourage spectrum warehousing by partitioning of non-desirable or hard to serve spectrum to avoid buildout dates and then reaggregating the same spectrum at a later date).

WISPA therefore encourages the Commission to permit small and rural providers to have a two-year buildout extension *or*, alternatively, to permit the acquiring provider to use non-population-based performance requirements. The Commission also should impose a minimum holding period for all partitioned or disaggregated licenses and should not permit reaggregation.

III. THE COMMISSION SHOULD CREATE A MORE EFFICIENT PROCESS FOR SECONDARY MARKET TRANSACTIONS

Commenters in this proceeding are in near-unanimous agreement that the Commission's secondary market transaction approval process can and should be made more efficient. WISPA supports this view, with the understanding that the Commission should retain necessary oversight of the approval process and not completely offload responsibility for the partitioning, disaggregation, and leasing process to private entities alone.

WISPA believes that the Commission should relax its filing requirements and apply notification³⁵ and immediate application approval procedures similar to those it uses for spectrum manager and short-term leasing arrangements. As WISPA stated in its initial Comments, the Commission could require certifications from the parties that they are either an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area and to certify that the transaction is within the Commission rules.³⁶ There is simply no need for a public notice and 30-day comment period for basic secondary market transactions. Necessary public disclosure and agency oversight can be maintained using substantially simplified mechanisms.

Many commenters agree that the Commission should apply either its immediate approval procedures or a similar automated approval procedure for secondary market transactions. For example, CTIA contends that the Commission should allow for either simple notification to the

³⁵ See WISPA Comments at 9.

³⁶ *Id.*

Commission or, alternatively, the existing immediate approval procedures to apply to secondary market filings that meet eligibility requirements established by the Commission's rules.³⁷ Select Spectrum agrees that the Commission should utilize its immediate approval process for less complex transactions to "facilitate more and faster spectrum transactions."³⁸ Google recommends the use of an automated system as a means of increasing participation similar to the SAS that has been utilized by CBRS band.³⁹ These commenters and WISPA all agree that the Commission should implement a procedure that speeds up the approval process of secondary market transactions as a way to lower transaction costs and accelerate service.

Some commenters suggest the use of an automated database⁴⁰ as a way to reduce costs and stimulate the secondary market. WISPA opposes R Street Institute's proposal to employ an automated database to the extent that process would be a replacement for the Commission's spectrum management function and a substitute for approving the qualifications of parties to the secondary transactions to alienate and to hold Commission authorizations.⁴¹ Among other things, Commission oversight is necessary to determine if the unaffiliated "carriers" participating in the transactions meet Commission eligibility requirements and to ensure that there is no impermissible reaggregation of spectrum to a larger carrier.

Conclusion

For all of the foregoing reasons, the Commission should adopt the broad definitions of "unaffiliated covered small carrier" and "unaffiliated carrier to serve a rural market" proposed in the WISPA Comments. The Commission also should afford flexibility to both parties to a

³⁷ See CTIA Comments at 7.

³⁸ Select Spectrum Comments at 1.

³⁹ See Google Comments at 10-11.

⁴⁰ See *id.* Federated Wireless Comments; DSA Comments at 12.

⁴¹ See R Street Institute Comments at 2-3 (suggesting that the Commission might "remove itself entirely from review of secondary market deals").

secondary market transaction to reduce reasonably their performance requirements. The Commission should not permit reaggregation as it would run counter to the policy goals of expanding opportunities for small and rural providers. Finally, the Commission should streamline its secondary market procedures but should not cede management of the process to third parties.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

By: /s/ Claude Aiken
Claude Aiken, President & CEO

Stephen E. Coran
David S. Keir
Gregory W. Coutros
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
202-429-8970

Counsel to the Wireless Internet Service Providers Association

July 1, 2019